19 51 **File No.** O. Prohibition 51

P 23 E Legal Dept.

A **BRANCH**

Subject:—

Opinions under the Bombay Prohibition Act, 1949

File No. O. Prohibition/51

Gen. 191 e.

C O N T E N T S.

Legal Department File No. O. Prohibition/1951.

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EVY. 30/6.

Office of the R.L.A.

The proposal made by the Prohibition and Excise Commissioner in this file is to levy an assessment fee on denatured and rectified spirits. Such fee is proposed to be recovered when denatured and rectified spirits are sold by distilleries to parties other than wholesalers and by wholesalers to parties other than retail dealers and by retail dealers to the consumers. This fee will be in addition to the fixed licence fee required to be paid by the licensees. The Excise Department view appears to be that it is part of the licence fee but is recovered in arrears on equitable, grounds. They Bombay Prohibition Act, 1949, provides for the levy of a fee for the grant of a licence. But as pointed out by the Advocate General in his opinion No. 7 dated 13-4-1949 (copy forwarded to the Revenue Department with this Department U.R. No. 4283 dated 20-4-1949) the fee which Government charge for the grant of a licence must be one which has to the cost incurred by Government in issuing the licence and in regulating the sale or possession. The licence fee must be charged bona fide for meeting such expenses. Applying this test it does not appear it would be legally feasible to levy assessment fee as proposed by the Prohibition and Excise Commissioner. The levy of the fee appears to amount to a tax on the sale sales of the spirits. It appears that such fee is also being levied at present on the sales of potable foreign liquors. In order to regularise the whole matter the best solution would be to suitable amend the Bombay Prohibition Act, 1949.

Sd/-

Remembrancer of Legal Affairs.

U.R. to R.D., No. 188-Confl., dated the 20th February 1951

EVY. 29/6.

Office of the R.L.A.

Attention is invited to R.L.A.'s opinion No. 115 Confdl. dated 5th February 1951. (Copy enclosed). As stated in that opinion, the Crown is not bound by statute unless named therein expressly or by necessary implication. As held by the Privy Council in the case of the Provice of Bombay vs. Municipal Corperation, Bombay 49 Bom. L.R. 257, the Crown may be bound by the necessary implication if it is manifest from the very terms of the statute that it was the intention of the legislature that the Crown should be bound. The Bombay Prohibition Act, 1949, does not bind the Crown either expressly or by necessary implication. There is no prevision in the Act which expressly requires the Crown to take out a licence for the manufacture of liquor; neither is it manifest from the very terms of the Act that it was the intention of the legislature that the Crown should be required to take out such licence. As pointed out in R.L.A's opinion referred to abve, after achievement by India of the Republicanx form of Gevernment, there is no Crown in India, but the principle underlying the rule that the Crown is not bound by statute unless named in it expressly or by necessary implication inheres in the Republican form of Gevernment. Applying, therefore, the principle referred to above to the Bombay Prohibition Act, 1949, it can be held that the State Government is not bound by the Act. No licence for the manufacture of liquor would, therefore, be necessary in the case of the Nasik Distillery. This view is also confirmed by the practice prevailing in the past, namely that, no licence was m ever issued to the Nasik Distillery under the Bombay Abkari Act, 1878 (see para 2

of the letter of the Superintendent, Government Central Distillery, dated the 18th January 1951 at page 13 ante).

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Remembrancer of Legal Affairs.

U.R. to R.D., No. 6229/, dated the 17th April 1951.

EVY. 29/6.

Office of the R.L.A.

Bombay Prohibition Act, 1949.

Section 8.

It would be desirable not to furnish a copy of the Government Resolution to the Soliciters. They may, however, be furnished a copy of the Press-note and they may be told that all information regarding the constitution of the Board is contained in that note. The question of claiming privilege in respect of the Government Resolution can be considered if and when the matter is taken to the court. In the meantime Government should take steps to issue a fresh order under section 8 of the Act for the constitution of the Medical Boards. Steps may also be taken to issue rules, if they are not already framed, regulating the precedure regarding the work of medical Board.

2. The reply proposed by the Director of Prohibition to point 2(b) and that proposed by the Revenue Department to point ~~2~~ 2(b) and that proposed by the Revenue Department to point 2(c) in their note of 30-1-51 at page 37 ante are free from objection.

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Remembrancer of Legal Affairs.

U.R. to R.D., No. 6388, dated the 21st April 1951.

EVY. 29/6.

Office of the R.L.A.

It appears that stocks of foreign liquor imported by Messrs. Mohan Brothers are placed in a Bonded Warehouse and removed from there to ships proceedings to foreign ports. The stocks being in the Bonded Warehouse are not within the jurisdiction of the State. The removal of such stock to vessels proceeding to foreign port would be governed by the provisions of the Sea Customs Act, 1878. Under section 112 of that Act provisions and stores warehoused at the time of importation may, within a period of three years from the date of the bond executed under section 92, be shipped without payment of duty for use on board of any vessel proceeding to a foreign port. In view of this provision of the Act no restriction under the Bombay Prohibion Act can be placed on the removal of foreign liquor from a Bonded Warehouse straight to any vessel bound for a foreign port. It will not, therefore, be legally feasible to ask Messrs. Mohan Brothers to take out a licence as contemplated in the letter of the Direct of Excise and Prohibition at page 1 ante.

2. The position stated above is supported by arguments advanced by the Attorney General in the recent Prohibition Appeal before the Supreme Court. In the course of his arguments the Atterney General made it clear that so long as foreign liquor was in a Bonded Warehouse, its removal therefrom to any foreign port or State was not hit by the provisions of the Bombay Prohibition Act, 1949, and reference in support of his arguments, was made by the Atterney General to sections 29 and 147 of the Bombay Prohibition Act, 1949.

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Remembrancer of Legal Affairs. P.T.O.

U.R. to R.D., No. 8074, dated 22nd May 1951.

EVY. 29/6.

Office of the R.L.A.

In the recent Prohibition Appeal case the Supreme Court has held that clause (a) of sub-section (1) of section 24 of the Bombay Prohbition Act, 1949, in so far as it prohibits commendation of any intoxicant or hemp is invalid. No question, therefore, arises whether the advertisement in question commends any intoxicant. The advertisement in question would appear in the Times of India Directory which is intended to give information about persons, trades professions, etc. It can hardly be considered as soliciting the use of or offering any intoxicant within the meaning of section 24(1)(a). It does not accordingly fall within the mischief of the aforesaid provision of the Act.

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Remembrancer of Legal Affairs.

U.R. to R.D., No. 8669, dated the 2nd June 1951.

EVY. 29/6.

Office of the R.L.A.

It is not clear from the papers whether the decision of the Government of Baroda to refund 25% of the licence fee was an ex-gratia payment or was in the nature of a settlement or compromise in the discharge of its legal liabilities. But the said step was taken by the State with a view to co-operate with the Government of Bombay in its Prohibition policy. A part of the said decision was acted upon and the decision appears to be equitable. As suggested by the Director of Prohibition Government may order the refund of the amount which has not been paid.

Sd/-

Remembrancer of Legal Affairs.

U.R. to R.D., No. 9230, dated the 12th June 1951.

EVY. 29/6.

Office of the R.L.A.

Search without warrant.

Bombay Prohibition Act 1949, sec. 120 and secs. 118 & 128, Criminal Procedure Code 1898, sec. 165.

R.L.A's Opinion No. 4622, dated 20-3-51.

The question which was the subject-matter of R.L.A's opinion in U.R. No. 4622, dated 20th March 1951 was whether section ~~21~~ 120 of the Bombay Prohibition Act, 1949, empowers any police officer to enter any place and search it. The answer given was in the negative. Section 120 empowers the Director, the Collector, a Prohibition Officer duly empowered or any Police Officer-

(a) to enter any place where he has reason to believe any intoxicant or any distillation still or apparatus etc. is kept;

(b) to seize such intoxicant or still;

(c) to search and detain any person.

It does not refer to the power of the officer to search any place generally. The contention of the Chief Police prosecutor that the general power of search is implied in section 120 is wrong and has no substance.

2. The relevant provisions which relate to the power of search under the Bombay Prohbbition Act, 1949, are sections 118 and 128. Sub-section (1) of section 118 provides that in places without Greater Bombay the provisions of the Criminal Procedure Code relating to cognizable offences will apply to offences under the Bombay Prohibition Act. Sub-section (2) of that section provides that in Greater Bombay the provisions of the City of Bombay Police Act will apply. The provision of the Criminal Procedure Code relating to the power of the Police Officer to search is section 165. The corresponding provision in the City of Bombay Police Act is section 66. Both the provisions provide that in cognizable cases an officer in charge of a Police Station or a Police Officer making an investigation can search a place without a search warrant from the Magistrate. In offences under the Bombay Prohibition Act, 1949, this

power of search which is available in the case of cognizable offences can be exercised by the Police Officers mentioned in these sections after following procedure laid down therein. But in addition to these officers section 128 of the Bombay Prohibition Act, 1949 provides that the power of issuing search warrants can be exercised by the Director, Collector, a Prohibition Officer specially empowered, a Magistrate, District Superintendent of Police or an Assistant or Deputy Superintendent of Police specially empowered. To a certain extent the Bombay Prohibition Act has relaxed the general law of search by making offences under the Act to ~~search with~~ cognizable and thus enabling the Police Officers or Police Officers investigating offences under the Act to search without warrants and also enabling certain other officers to issue search ~~without~~ warrants. The power given to Police Officers to search without a warrant and to other officers to issue search warrants are similar to these which are given by the Legislature in the case of such special offences as those under the Bombay Prevention of Gambling Act, 1887. The present provisions of the Bombay Prohibition Act regarding search are exactly similar in terms of these in the Bombay Abkari Act, 1878 (Secs. 36, 37 and 38). Mr. ~~Mirandas~~ at page 29 ante states that under the Bombay Abkari Act Police Officers of an above the rank of Head Constables were invested with the powers of search. It is not clear what is the basis of the statement. There is no express provision in the Bombay Abkari Act investing Police Officers with such power. It is not known whether the Police Officers were invested with such powers as Abkari Officers. If that is so, under x section 6 of the Bombay Prohibition Act, Police Officers of suitable rank can be invested with such

power. The power of searching persons or places is an important restriction on the liberty of a citizen and unless sufficient safeguard is provided against the above or indiscriminate use of such power, the Courts, under the present Constitution particularly, would be inclined to hold that a general power of search to any Police Officer of whatever rank i.e. ~~x~~ even to a Police Constable is inconsistent with article 19 of the Constitution and is not legal.

Sd/-

Remembrancer of Legal Affairs.

Secretary to R.D.

ur t RD No. 9707 of 20-6-57

EVY. 29/6.

Office of the R.L.A.

Cancellation of Excise agreement- Danta State Compensation for.

In this case the Excise Contract was entered into by the Danta State with the Contracter on 3rd June 1948 and it was to rund for 5 years. On the merger of the State according to the general principles of law the said contract was not binding on the Bombay Government. But the Administrator i.e. the Collecter of Banas Kantha was directed to permit the contractor to run the distillery upto 31st March, 1949. It is true that the licence fee was recovered by him. But it does not appear that the Excise Department ever informed the contractor that the original agreement was ratified. In these circumstances Government is not bound by the terms of the contract and if on account of the provisions of the Bombay Prohibition Act the distillery is to close down, the contractor is not entitled to any compensation (Mugler v. Kansas, 123 U.S. 623).

Sd/-

Remembrancer of Legal Affairs.

U.R. to R.D., No. 10119, dated the 26th June 1951.

EVY. 29/6.

Office of the R.L.A.

The question for consideration is whether these cases under the Bombay Prohibition Act, 1949 which under the present procedure are tried as warrant cases, should, in order to avoid delays in trial, be tried as summons cases and, if so, how that is to be achieved.

2. Section 116 of the Act lays down the procedure to be followed by Magistrates in all trials of offences under the Act. The procedure prescribed it that laid down in the Code of Criminal Procedure for the trial of summary cases in which no appeal lies. Section 261 (1) of the Code lays down that in summary trials the procedure prescribed for summons cases shall be followed in summons cases and procedure prescribed for warrant cases shall be followed in warrant cases. Reading this in the light of the definitions of "summons Case" and "Warrant case" in clauses (v) and (w) of section 4 of the Code, the conclusion, so far as is relevant to the trial of offences under the Prohibition Act, is that in respect of offences punishable with imprisonment exceeding six months, the procedure of warrant cases is to be followed, and in cases of offences puhishable with a lesser period procedure for summons cases is to be followed.

3. The Prohibition Act contains provisions which aim at expediting investigations and trials. One of these provisions is section 118 by which all offences under the Act are made cognizable. This is a departure from the ordinary provision contained in Schedule II to the Code of Criminal Procedure where offences against other laws (that is laws other than the Indian Penal Code) are non-cognizable if the imprisonment is for a period less than 3 years. The

Offences under the Prohibition Act are punishable with imprisonment for less than three years. The other provision is section 116 which provides for summary trials for all offences under the Act. In view of these provisions and having regard to the fact that several of the offences under the Prohibition Act are punishable with imprisonment for more than six months (see sections 65, 66, 67, 68, 69, 72, 85, ~~96~~ 95, 96 and 97), in some of which the imprisonment extends to two years, it may not be expedient or desirable to make a further departure from the salutary provisions of section 262(1) of the Code in respect of the procedure to be followed in these prohibition cases where the offences are punishable with imprisonment for more than 6 months.

Sd/-

Remembrancer of Legal Affairs.

U.R. to H.D., No. 13946, dated the 30th August 1951.

EVY. 29/6.

Office of the R.L.A.

According to the procedure proposed by the Chief Traffic Manager, G.I.P. Railway, and agreed to by the Director of Excise and Prohibition, the Station Master of any station who finds any unclaimed or untraceable owner, parcels or packages or any articles or packages suspected to contain any excisable contraband articles will immediately inform the nearest Police Officer about it who will then try to trace the offender in respect of any such parvel and if the offender is traced, he will take the necessary action under the Bombay Prohibition Act and if the offender is not raced he will proceed according to the procedure laid down in sections 100 and 101 of the Bombay Prohibition Act. The articles seized and forwarded to the Police would be disposed of in accordance with the rules regulating the disposal of such articles framed by the Commissioner under his notification No. 81-6/39(d) dated 13th March 1939, as amended. He propsses that if the articles are sold, the sale proceeds will be allocated in the following manner: "Excise dues will be recovered first and then the expenses incurred by the Prohibition and Excise Department will be recovered; then the railway charges including freight charges shall be paid from the balance and the residue, if any, shall be credited to the Government". The railway authorities appear to contend that by virtue of section 56(2) of the Indian Railways Act, the railways will have a lien over the sale proceeds of such articles in respect of freight and other charges. In other words, they contend that the railway freight and other charges will have a priority over the excise dues and the expenses incurred by the Prohibition and Excise Department. The R.L.A. is requested to advise.

Section 98 (1) of the Bombay Prohibition Act provides that whenever any offence punishable under this Act has been committed, the contraband excisable articles shall be confiscated by the order of the Court. Section 99 provides for the return of things liable to confiscation to bonafide owners. Section 100 provides that, when an offence under this Act has been committed and the offender is not known or cannot be found or when anything liable to confiscation under this Act is found or seized, the Director, the Collector or any other officer authorized by the State Government in this behalf, may make an inquiry and, if after such inquiry, is satisfied that the offence has been committed, may order the thing found to be confiscated. If packages containing contraband excisable articles or suspected to contain such articles are received at a railway station the Station Master, according to the procedure agreed to, will hand over such packages to the nearest Police Station. The packages will have, therefore, to be opened and if they contain contraband excisable articles, and the offender is not known or cannot be found, then an inquiry will have to be held under section 100 and if the officer concerned is satisfied that the offence has been committed, he may order the thing found to be confiscated. If the package does not contain any contraband excisable article, it will have to be returned to the Station Master to deal with it according to the provisions of the Railways Act.

If the articles are confiscated under section 100 on the ground that the offender is not known or cannot be found and the offence has been committed, then the articles would vest in Government and can be disposed of. Prima facie, the sale proceeds thereof would vest in Government. But under

section 56(2) of the Indian Railways Act, unclaimed things on a railway can be disposed of, rendering the surplus, if any, of the proceeds of the sale to any person entitled thereto. The Railway authorities, therefore, contend that they have a prior claim over the sale proceeds of the articles confiscated under section 100 of the Bombay Prohibition Act, 1949, in respect of the railway freight and other charges. But section 56(2) can be resorted to by the Railway authorities only if the owner of the articles is not known or notice cannot be served upon him or he does not comply with the requisition in the notice; but when articles are confiscated under section 100 of the Bombay Prohibition Act, the question of resorting to section 56(2) of the Indian Railways Act would not arise at all for the articles being no longer in charge of the railway, and being confiscated, could not be sold by the railway authorities. In the circumstances, it appears that strictly speaking the proposal made by the Director of Prohibition and Excise in his letter at page 9 appears to be proper. However since the Railway authorities agree to hand over the packages to the police with a view to cooperate in the enforcement of the Bombay Prohibition Act and the freight and other charges can be legitimately claimed by them, it would be desirable to evolve some arrangement agreeable both to the Railway authorities and Director of Excise and Prohibition.

Sd/-

Remembrancer of Legal Affairs.

U.R. to R.D., No. 15253, dated the 24th September 1951.

EVY. 29/6.

Office of the R.LAA.

In virtue of the provisions of clauses (c) and (d) of section 12 of the Bombay Prohibition Act, 1949, it would be open to prohibit the sale or export of rectified spirit and absolute alcohol outside the State In the case of the State of Bombay v. Fram Nusserwanji Balsara the Supreme Court considered the validity of section 12 of the Act and came to the concusion that clause (c) of section 12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol and clause (d) of section 12, so far as it affects the selling or buying of such medicinal and toilet preparations containing alcohol are invalid. According, therefore, to this judgment of the Supremem Court, clauses (c) and (d) of section 12 are validly enacted in so far as they do not affect the possession case mentioned above the petitioner attached section 12 of the Act and other provisions thereof as interfering with or calculated to interfere with inter-State trade and commerce but the argument in support of that contention was not founded on the provisions of the Constituion of India in view of the express provision of article 305 under which the provisions of the existing lay were saved from the operation of articles 301 and 303. An argument was, therefore, sought to be founded on the provisions of section 297 of the Government of India Act, 1935, which was the Constitution which governed India when the Bombay Prohibition Act, 1949, was enacted. The Supreme Court following the decision of the Federal Court in the case of Bholaprasad v. Emperor (1942 F.C.R. 17) negatived the contention of the petitioner founded on section 297 of the Government of India Act. Any ban on the sale or exp-

ort (as defined in the Act) of rectified spirit and absolute alcohol outside the State would not, therefore, be unconstitutional.

Sd/-

Remembrancer of Legal Affairs.

U.R. to R.D., No. 15896, dated the 6th October 1951.

EVY. 29/6.

Office of the R.L.A.

A similar question was considered by the R.L.A. last year in connection with the visit of H.M.S. 'MAURITIUS' to the Indian Navy. The R.L.A. held that the Bombay Prohibition Act will have to be interpreted as being subject to the rule of International Law and would not apply to the public ships of a foreign State such as a Man-of-war. A copy of the said opinion is forwarded for persual.

Sd/-

Remembrancer of Legal Affairs.

U.R. to Chief Secy. No. 19617, dated the 6th December 1951.

EVY. 29/6.